



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2004

Ms. Martha McCabe
Assistant Director of General Law
Public Utility Commission of Texas
1701 North Congress Avenue
Austin, Texas 78711

OR2004-9615

Dear Ms. McCabe:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211696.

The Public Utility Commission (the "commission") received a request for copies of "recently executed third-party contracts approved by the [commission] for [the Electric Reliability Council of Texas ("ERCOT")]" to review financial administration and security services."¹ Although you state that one engagement letter has been released, you claim that the second engagement letter is excepted from disclosure under sections 552.101, 552.108 and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by ERCOT and the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we address your assertion that the submitted engagement letter is excepted from disclosure based on the confidentiality provision in the engagement letter. We note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.W.2d 668, 677 (Tex. 1976). In other words,

¹ ERCOT is the independent system operator certified by the commission pursuant to the Public Utility Regulatory Act § 39.151(c) to perform certain statutorily prescribed functions for that portion of the state that is open to retail competition. This ruling need not address whether ERCOT is a governmental body subject to the Act's required disclosures.

a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the engagement letter is encompassed by an exception to disclosure, it must be released to the requestor, notwithstanding any expectation or agreement to the contrary.

You also claim that the engagement letter is confidential pursuant to section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 418.177 of the Government Code provides:

Information is confidential if the information:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Gov’t Code § 418.177. As part of the Texas Homeland Security Act, the Seventy-eighth Legislature added sections 418.176 through 418.182 to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. The fact, however, that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under this provision. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of this statute’s key terms is not sufficient to demonstrate its applicability. As with any exception to disclosure, a governmental body asserting section 418.177 must adequately explain how the responsive records fall within the scope of this provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

The information at issue consists of an engagement letter submitted by a third party consultant to the commission and ERCOT. However, neither the commission nor ERCOT argues, and it does not appear from our review, that the commission is maintaining this information for the purpose of preventing, detecting, or investigating an act of terrorism. Furthermore, the engagement letter neither constitutes nor reveals the contents of a

vulnerability assessment. Accordingly, we conclude that both the commission and ERCOT have failed to demonstrate that the requested information is confidential under section 418.177, and it cannot be withheld under section 552.101 on that basis.

You also claim that the engagement letter is excepted from disclosure under section 552.139 of the Government Code, which provides, in relevant part:

- (a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.
- (b) The following information is confidential:

- (1) a computer network vulnerability report; and
- (2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Neither the commission nor ERCOT has submitted any arguments explaining how the engagement letter relates to computer network security or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Furthermore, as previously stated, the engagement letter is not a computer network vulnerability assessment or report. Consequently, the engagement letter is not excepted from disclosure under 552.139. Therefore, the commission may not withhold any portion of the engagement letter under section 552.139.

Lastly, you claim that the engagement letter is excepted under section 552.108, which excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime. . . ." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold

the information. You state that the engagement letter relates to an ongoing investigation by the Texas Department of Public Safety ("DPS") into possible criminal conduct. However, this office has not received a representation from DPS that the agency seeks to withhold the engagement letter under section 552.108. Therefore, section 552.108 is inapplicable to the information at issue, and no portion of the engagement letter can be withheld under this exception. As no other exceptions are claimed for this information, it must be released in its entirety to the requestor.

However, we note that portions of the engagement letter are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

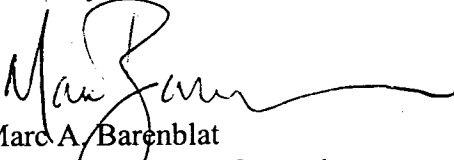
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 211696

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